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**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Order Instituting Investigation to Address
Intrastate Rural Call Completion Issues.

Investigation 14-05-012
(Filed May 15, 2014)

**CTIA COMMENTS ON ASSIGNED COMMISSIONER'S
RULING REGARDING ISSUES RAISED AT PUBLIC
PARTICIPATION HEARINGS AND WORKSHOPS**

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Pursuant to the Assigned Commissioner’s Ruling Inviting Public and Party Comment Regarding Issues Raised at Public Participation Hearings and Workshops issued in the above captioned proceeding on September 8, 2016 (“Ruling”), CTIA¹ submits the following limited comments in response to questions regarding “9-1-1 and dial tone access issues.”²

I. INTRODUCTION

This proceeding to address intrastate call completion problems takes place against the backdrop of a larger national effort to address these issues. The Federal Communications Commission (“FCC”) already has rules in place prohibiting the blocking of calls³ and requiring all carriers that make decisions on the routing of calls to provide detailed reports regarding their success rates for terminating calls to rural areas as compared to other areas.⁴ Carriers’ reports

¹ CTIA – The Wireless Association® (“CTIA”) (www.ctia.org) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st century connected life. The association’s members include wireless carriers, device manufacturers, suppliers as well as apps and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. The association also coordinates the industry’s voluntary best practices, hosts educational events that promote the wireless industry and co-produces the industry’s leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C.

² Ruling pp. 7, 9, Questions 5.A. and 5.B.

³ *Developing a Unified Inter-carrier Compensation Regime, et al.*, CC Docket No. 01-92 *et al.*, Declaratory Ruling, 27 FCC Rcd 1351 (Wir. Comp. Bur. 2012).

⁴ *Rural Call Completion*, WC Docket No. 13-39, Report and Order and Further Notice of Proposed

are available to state commissions subject to confidentiality protections.⁵ Thus, the Commission already has access to extensive data relevant to call completion issues in California.

In formulating its questions on “9-1-1 and dial tone access issues,” the Ruling raises issues that have been recently addressed by the Commission, are currently pending before the FCC, and/or are outside the purview of the Commission’s jurisdiction. As such, the Commission should not take any action with respect to these issues.⁶ Specifically, the Commission should not take any action with respect to rural outage reporting.⁷ Consideration of rural outage reporting requirements, in addition to being outside the scope of the proceeding, would be ill-timed at best and unlawful at worst. Not only did the Commission recently reject the imposition of state specific rural outage reporting requirements on wireless carriers,⁸ the FCC is actively considering rural network outage reporting standards designed to address the differing attributes of a rural area.⁹ The precise requirements of the FCC’s rules, however – including the definition of rural areas and the thresholds for reporting – are not yet finalized. Requiring wireless carriers serving rural areas to comply with differing reporting obligations in rural areas would, at minimum, impose unnecessary burdens and costs on wireless carriers seeking to serve rural areas in California. Any inconsistencies with federal requirements would also give rise to preemption concerns.

Rulemaking, 28 FCC Rcd 16154 (2013).

⁵ *Id.* at 16199 ¶ 109; 47 C.F.R. § 64.2109(b).

⁶ Ruling, p. 1 (asking parties to “make suggestions about Commission action to address the issues raised.”).

⁷ See Ruling, p.8, Question 5. A (“Is 90,000 user minutes an appropriate threshold for outage reporting in California, or another threshold, and if so why? Should outage reporting be required in rural counties defined as those with a population of less than 600 people per square mile or less, or in both rural and urban counties, and if so why? Should all telephone corporations be required to report such outages, or only a subset such as wireline or wireless?”).

⁸ At the Commission’s August 25, 2016 meeting, it voted not to adopt an Alternate Proposed Decision which would have imposed state specific rural outage reporting requirements on wireless carriers.

⁹ *Amendments to Part 4 of the Commission’s Rules Concerning Disruptions to Communications, et al.*, Report and Order, Further Notice of Proposed Rulemaking, and Order on Reconsideration, FCC 16-63 (rel. May 26, 2016) (“Outage Reporting NOPR”).

In addition the Commission should not take any steps “to address gaps in communications facilities, services, and networks” or “delays in establishing connections through a [cells on wheels] (“COW”) or cells on light trucks (“COLT).”¹⁰ These issues do not relate to call *completion* and thus are outside the scope of this proceeding, and also are outside this Commission’s authority.

II. THE COMMISSION SHOULD NOT ADDRESS RURAL OUTAGE REPORTING REQUIREMENTS IN THIS PROCEEDING

The Ruling’s consideration of rural outage reporting requirements for wireless carriers is unnecessary considering the Commission has just ruled on the issue one month ago.¹¹ In its Service Quality proceeding, the Commission recently rejected a proposed decision that would have imposed notification requirements for rural outages that last 30 minutes and potentially affect 90,000 user minutes.¹² Despite this recent action by the Commission, the Ruling once again raises the issue of whether 90,000 user minutes is an appropriate threshold for outage reporting in California. The Ruling provides no rationale as to why this issue should be addressed again immediately on the heels of its recent rejection by the Commission.

Moreover, the FCC is currently considering proposed rules for rural outage reporting. Specifically, the FCC sought comment on a proposed reporting requirement that would obligate a wireless provider serving a rural area to file outage reports whenever one-third or more of its

¹⁰ See Ruling, p.9, Question 5.B (“What steps should this Commission take in this or other proceedings to address.... delays in establishing connections through a COW or COLTs...?”).

¹¹ It is unclear whether the questions posed in the Ruling are a precursor to the formulation of specific rules. The scope of this investigation is limited to gathering of information and making findings thereon. To the extent that the Commission determines to take further action by way of regulation, it must open a rulemaking. See Order Instituting Investigation Addressing Intrastate Call Completion Issues, I. 14-05-012, p. 2 (“[c]ontingent upon findings in this OIL, [the Commission] will then consider opening an Order Instituting Rulemaking (OIR) proceeding to propose remedies to address problems identified in this Investigation.”). Adopting any rules as part of this proceeding goes beyond its designated scope and would subject the decision to annulment. See *Southern California Edison Co. v. Public Utilities Com.*, 140 Cal. App. 4th 1085 (Cal. App. 2d Dist. 2006) (annulling Commission decision as beyond the scope of the proceeding).

¹² See Alternative Proposed Decision of Commissioner Sandoval, R. 11-12-001, Revision 1, p. B12.

macro cell sites¹³ serving that area are disabled such that communications services cannot be handled through those sites, or are substantially impaired due to the outage(s) or other disruptions affecting those sites.¹⁴ As part of its proposal, the FCC also sought comment on what constitutes a “rural area.”¹⁵ Any action by the Commission in this proceeding to establish reporting requirements could risk obligating carriers to submit different outage reporting data to separate regulators, thereby imposing a burden without any offsetting consumer benefit. Even worse, such dual reporting requirements could have the unintended consequence of actually harming public safety by diverting critical resources and attention away from the most important task following an outage -- restoring service as quickly as possible.

Finally, the potential inconsistency of state level rural reporting rules with federal law raises preemption concerns. Situations where regulators must balance competing policy objectives in crafting a regulatory scheme “lend themselves to a finding of conflict preemption” because a state scheme that differs from the federal scheme “permits re-balancing of those considerations.”¹⁶ The “public safety issues”¹⁷ raised by outage reporting intensify this concern, given the specific federal statutory directive that state commission action with respect to IP-enabled service providers’ 9-1-1 service may not be “inconsistent with Federal law or [FCC] requirements.”¹⁸

¹³ Macro cells are high-powered wireless base stations owned by a wireless carrier that are intended to provide coverage to a large area for mobile network users (e.g., a county).

¹⁴ *See generally* Outage Reporting NOPR. Opening Comments were filed with the FCC on August 26, 2016 and Reply Comments on September 12, 2016.

¹⁵ Outage Reporting NOPR ¶ 186.

¹⁶ *Farina v. Nokia*, 625 F.3d 97, 123 (3rd Cir. 2010).

¹⁷ Ruling, p. 7, Item 5 A (noting public safety concerns connected with outage reporting)

¹⁸ 47 U.S.C. § 615a-1(d).

III. WIRELESS NETWORK GAP ISSUES, ESPECIALLY DEPLOYMENT OF COWS AND COLTS, ARE OUTSIDE THE SCOPE OF THIS PROCEEDING AND THE COMMISSION’S AUTHORITY

The Ruling Inviting Comments states that parties in three of the workshops raised questions about “gaps in communications facilities, services and networks, delays in establishing connections through a [COW] or COLTs, and other issues that affect reporting 9-1-1 emergencies, fire-fighting, public safety, addressing disasters, and disaster recovery,” and seeks comment regarding what steps the Commission might take to address these issues.¹⁹ These questions are generally not germane to an investigation of rural call completion issues and, to the extent that they stray into the scope and location of the deployment of wireless network facilities, exceed the Commission’s authority. Thus, the Commission should not consider these issues in this proceeding.

A. These Issues Are Not Relevant to Rural Call Completion

This proceeding was opened to review “intrastate call completion failures in California, particularly in rural areas of the state” and was expanded to include “a review of 9-1-1 call completion issues in California.”²⁰ Thus, in all events, this proceeding is focused on carrier failures to *complete* calls.

In contrast, as pertains to wireless carriers’ “gaps in communications facilities, services, and networks, delays in establishing connections through a COW or COLTs, and other issues that affect reporting 9-1-1 emergencies, fire-fighting, public safety, addressing disasters, and disaster recovery,”²¹ all either focus on the ability of the public or first responders to *initiate* calls or on the absence of wireless network facilities. Call initiation issues are obviously not within

¹⁹ Ruling at 7, 9.

²⁰ *Order Instituting Investigation to Address Intrastate Rural Call Completion Issues*, I.14-05-012, Assigned Commission’s Scoping Memo and Ruling (May 6, 2015) (“Scoping Order”) at 1-2.

²¹ Ruling at 9.

the scope of a docket examining call *completion*; the issue of rural call completion is generally understood to implicate circumstances in which carriers have not taken reasonable steps to ensure delivery of calls to another carriers' network, which is potentially a violation of carriers' common carriage obligations under section 201 and 202 of the Communications Act of 1934.²² The absence of wireless network facilities, whether due the absence of constructed wireless facilities or wireless facilities having been rendered inoperable, is an issue subject to the sole jurisdiction of the FCC, as explained *infra*, and does not implicate the common carriage issues surrounding rural call completion.

The present docket was not scoped to consider issues unrelated to common carriage obligations, and therefore the Commission cannot address those unrelated issues here. The Commission should maintain the scope of this proceeding and not allow itself to be impermissibly dragged into a wide-ranging general survey of public safety issues in general, to the detriment of its targeted consideration of any actual call completion issues at hand.

B. The Commission Lacks Authority to Regulate the Deployment of Wireless Network Facilities, Including COWs and COLTs

With respect to wireless carriers' networks, addressing "gaps in communications facilities, services, and networks" or "delays in establishing connections through a COW or COLTs"²³ also is beyond the Commission's authority. The FCC has sole jurisdiction over the licensing and placement of radio transmission facilities, including wireless carriers' network facilities. In enacting Section 301 of the federal Communications Act, as amended, "Congress has determined that overall management of the radio spectrum and the licensing of radio

²² *In the Matter of Developing a Unified Inter-carrier Compensation Regime and Establishing Just and Reasonable Rates for Local Exchange Carriers*, Declaratory Ruling, 27 FCC Rcd 1351, ¶4 (Wireline Competition Bureau, 2012).

²³ Ruling at 9.

facilities are areas within the exclusive jurisdiction of the Federal government.”²⁴ The need for a single “federal scheme for the provision of cellular service” and “the goal of introducing nationwide compatible cellular service without undue delay, also provides an independent basis for [the FCC] having sole jurisdiction over licensing of cellular facilities.”²⁵ The FCC stressed that “[i]t is imperative that no additional requirements be imposed by the states which could conflict with our standards and frustrate the federal scheme for the provision of nationwide cellular service.”²⁶

In 1993, Congress reinforced federal primacy over mobile services by adding language to Section 332 of the Communications Act stating that “no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a state from regulating the other terms and conditions of commercial mobile services.”²⁷ The cases construing the difference between regulating “entry” and “other terms and conditions” make it clear that the states lack jurisdiction to regulate the placement of wireless facilities or network quality. As one federal appeals court noted, “[t]he Act makes the FCC responsible for determining the number, placement and operation of the cellular towers and other infrastructure.”²⁸

Federal courts have concluded that state action that “would directly alter the federal regulation of tower construction, location and coverage, [and] quality of service” inevitably “tread directly on the very areas reserved to the FCC: the modes and conditions under which [a

²⁴ *Inquiry Into the Use of Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems*, Report and Order, 86 F.C.C. 2d 469, 504 ¶ 80 (1981), *modified on other grounds*, 89 F.C.C. 2d 58 (1982) (“*Cellular Recon. Order*”) (subsequent history omitted).

²⁵ *Id.* at 504 ¶ 81 n.74.

²⁶ *Cellular Recon. Order*, 89 FCC2d at 95 ¶ 81.

²⁷ *Id.* § 332(c)(3)(A).

²⁸ *Bastien v. AT&T Wireless Services, Inc.*, 205 F.3d 983, 988 (7th Cir. 2000) (citing regulations governing, *inter alia*, geographic coverage and antenna power and height requirements).

wireless carrier] may begin offering service” and “force [a wireless carrier] to do more than required by the FCC: to provide more towers, [and] clearer signals. . . .”²⁹

The Ninth Circuit has followed this approach. For example, the Ninth Circuit explained that a petition requesting a “court to decide the requisite number of cellular towers needed to support service” affects “market entry” and thus is outside the authority of the state.³⁰ Similarly, a state law claim that a wireless carrier’s “network was not sufficiently developed” is an “attack[] on . . . market entry,” and thus preempted.³¹

It is difficult to see how this Commission could take any action affecting “gaps in communications facilities, services and networks” with regard to wireless carriers or “delays in establishing” temporary wireless network facilities such as COWs or COLTs without straying into the prohibited zone of regulating “the number, placement and operation of the cellular towers and other infrastructure.”³² If the Commission wishes to take action to improve wireless carriers’ ability to respond to emergency situations or network outages, it should consider action in other proceedings to, for example, ensure its universal service programs adequately support mobile broadband networks, and that state credentialing programs for emergency responders

²⁹ *Id.* at 989. It should also be noted that state judicial action constitutes state regulatory action for purposes of the preemptive scope of Section 332. *Wireless Consumers Alliance, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 17021, 17027 ¶ 12 (2000) (“*WCA Order*”), *recon. denied*, 16 FCC Rcd 5618 (2001). Thus, complaint cases, too, are subject to the limits of this Commission’s authority to regulate the location or quality of wireless network facilities.

³⁰ *Shroyer v. New Cingular Wireless Services, Inc.*, 622 F.3d 1035, 1040 (9th Cir. 2010).

³¹ *McKinney v. Google, Inc.*, 2010 U.S. Dist. LEXIS 144800 *30-31 (N.D. Cal., Nov. 16, 2010), *dismissed*, 2011 U.S. Dist. LEXIS 97958 (N.D. Cal., Aug. 30, 2011). *See also Apple iPhone 3G Products Liability Litigation*, 728 F. Supp.2d 1065, 1072 (N.D. Cal. 2010), *recon. denied*, 2010 U.S. Dist. LEXIS 92035 (N.D. Cal., May 25, 2010) (claim that wireless network “was not sufficiently developed” was “founded on the fact that [the wireless carrier defendant] had not built more towers and more fully developed its network,” which is “an attack on . . . 3G market entry.”); *WCA Order*, 15 FCC Rcd at 17036-37 ¶ 28 nn.90-91 (claim that wireless carrier had not built enough towers “would . . . effectively regulat[e] the means and manner of entry by a CMRS carrier.”).

³² *Bastien*, 205 F.3d at 988.

adequately enable wireless carrier personnel to enter areas promptly where network restoration is critical.

IV. CONCLUSION

The questions in the Ruling which address network outage reporting, gaps in wireless communications facilities, services and networks, and the deployment of COWs and COLTs raise issues which have been recently addressed by the Commission, are currently pending before the FCC, and/or are outside the purview of the Commission's jurisdiction. The Commission should not take any action with respect to these issues.

Respectfully submitted October 4, 2016 at San Francisco, California.

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